IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE ATTORNEY GENERAL OF THE UNITED STATES, *Appellant,*

vs.

WILLIAM WADE RICKETTS, *Appellee.*

NO. 11594

On Appeal From the District Court of the United States for the Eastern District of Washington Northern Division

BRIEF OF APPELLEE

GEORGE W. YOUNG,
502 *Paulsen Bldg., Spokane, Wash.*
Attorney for Appellee.

SHAW & BORDEN CO. 292441

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CASES CITED

TEXTS CITED

STATUTES CITED

OPINION BELOW

The Trial Court rendered a memorandum opinion in favor of appellee. This was not reported. It is found at R. 345-356.

JURISDICTION

Jurisdiction of this action, which is one at law, is conceded by appellant. It is brought under 8 U. S. C. A. 903. (App. 14.)

APPELLEE'S STATEMENT OF THE CASE

Appellee was born at Hydro, Oklahoma, U. S. A., on February 3, 1902 (R. 10, 19). His parents were native born citizens of the United States (R. 10). At a time when he was approximately eight years of age, his parents homesteaded in Canada. His father became a British subject, being naturalized on the 31st day of December, 1914 (R. 170-171).

When appellee was in his seventeenth or eighteenth year, he served as school trustee and counsellor in a village called Meeting Lake, Sask. (R. 54). At or about the time appellee became twenty-one years of age, he expressed his intent to claim his natural right of American citizenship (R. 82-84). He resided in Canada until the year 1925 or 1926, the record is not entirely clear as to the exact date of his original departure from Canada (R. 11-12).

He first came to this country, following his original removal by his parents to Canada, in 1925 or 1926, crossing the border with a wife and child, declaring

himself to be a United States citizen (R. 158, 291-292). He took up residence in the Insley Apartments in Spokane and worked in and about Spokane for a period of six months (R. 11). He returned to Canada, and again came back to Spokane the following year, where he headquartered at the International Hotel for a period of six months, and engaged in timber work in districts neighboring Spokane (R. 12). He returned again to Canada where he lived until 1936.

Although not a registered voter in Canada, he was requested to and did vote in some election that was being held in the Province of Saskatchewan (R. 53-54).

In 1936 he returned to the United States and established a restaurant business shortly thereafter in the town of Twisp, Okanogan County, Washington (R. 14). While at Twisp he voted in local elections and participated in general civic life in that community (R. 15, 37-38).

He was arrested by U. S. immigration authorities, charged with being an alien unlawfully in the United States. He was tried, convicted, served ten days in the county jail and ordered deported (R. 14-15, 37). Following this experience, he again crossed the border between the Dominion of Canada and this country in the year 1939, finally locating in Spokane, Washington, where he established a restaurant business (R. 16). He was again apprehended by U. S. immi-

gration officers, charged with being an alien illegally within the country. He was advised by servants of the Department of Immigration and Naturalization to willingly depart the country, secure a passport and immigration visa and then come into the country as an immigrant (R. 16-17).

Convinced that he would be arrested and charged with a felony subject to two years in the penitentiary on conviction, and deported, appellee concluded to follow the course outlined by immigration officials. In the furtherance of such course, he signed various documents indicating that he was a Canadian citizen. He bowed to the conclusion of the Immigration Service that he was a British subject as it seemed to him to be the easiest solution of his problem. He did not waver, however, in his claim of citizenship (148-151).

During his life in the United States, he was consistent in his representation of being an American citizen. Statements in documents purporting to be a claim of citizenship other than American were made because of his urgent desire to enter and live in this country or in pursuit of an effort to extricate himself from the cloud placed upon his citizenship by reason of assertions of the U. S. Immigration and Naturalization Service (R. 148-151, 58-67).

His stay in the United States was continuous from 1936 on to the time of the trial of this case, except for interruptions forced upon him by the Immigration Service. He resided in Spokane continuously

since 1939 (R. 16). He has maintained business and property holdings continuously in this country (R. 16).

In the first week of January, 1943, he was again apprehended by the immigration authorities (R. 16). Under threat of prosecution he made a trip into Canada for the purpose of securing credentials which would enable him to re-enter the country (R. 16, 17, 37, 60).

Appellee registered and voted in elections in this country and assumed the burdens of citizenship. He registered under the Selective Service Act, disclosing to the Draft Board the fact of his conviction under naturalization laws (R. 32).

Appellee did not at any time take oath of allegiance to any country other than the United States, but to the contrary claimed that he owed his allegiance to the United States.

SUMMARY OF ARGUMENT

The Findings of Fact and Judgment should be affirmed because:

The findings are based on conflicting testimony.

Appellee acquired his citizenship by birth. The act of his father in becoming a naturalized citizen of Great Britain during appellee's minority did not deprive him of his right of U. S. citizenship acquired by birth.

Following his attainment of the age of twenty-one and continuously thereafter appellee claimed U. S. citizenship. No affirmative act of expatriation was established against him under any pertinent existing statute prior to the adoption of 8 U. S. C. A. 801 (Nationality Act of 1940), which by operation of its terms became effective on the 12th day of January, 1941.

At the time of the adoption of 8 U. S. C. A. 801, appellee was and had been continuously residing in the United States under the express declaration and determination of claiming his natural right of citizenship. Appellee is entitled to the benefit of the proviso in 8 U. S. C. A. 801-a.

ARGUMENT

"It is a well established principle that the trial court's findings of fact upon conflicting evidence will be binding on appeal and will not be disturbed by the appellate court where they are reasonably supported or sustained by some substantial, credible, and competent evidence, and where no error prejudicial to the appellant occurred in the ruling on the admission of evidence." 3 *Am. Jur.* (Appeal & Error) Sec. 901, p. 469-70;

Shopleigh v. Mier, 299 U. S. 468, 81 L. Ed. 355, 57 S. Ct. 261, 113 A. L. R. 253;

LaGrada v. U. S. (CCA 8th), 77 F (2d) 673, 103 A. L. R. 527, writ of certiorari denied in 296 U. S. 629, 80 L. Ed. 477, 56 S. Ct. 152;

Consolidated Flour Mills v. Ph. Orth. Co. (CCA 7th) 114 F (2d) 898, 132 A. L. R. 697.

APPELLEE IS NOT AN EXPATRIATE

His right of citizenship was guaranteed by the 14th Amendment to the Constitution of the United States (Appendix 13).

Congress has the right to make rules governing expatriation:

McKenzie v. Hare, 239 U. S. 299, 36 S. Ct. 106.

Until the enactment into law of the Nationality Act of 1940, a native born citizen could not lose his citizenship except by formal renunciation. The statutory enactment which provided for expatriation is the Act of March 2, 1907, 34 Stat. 1228, 8 U. S. C. A. 17 (now repealed by Nationality Act of 1940), the pertinent text of which is set for, Appendix 14.

Expatriation was, before the adoption of the Nationality Act of 1940, held to result from a compact, voluntarily entered into between the expatriate and the new state:

U. S. v. Eliason, (Dist. Ct., W. D. Wash. N. D.) 1926, 11 F (2d) 785;

Talbot v. Jenson (3 Dall.) 1 L. Ed. 540.

Residence abroad of a native born U. S. citizen however long, prior to the adoption of the Nationality Act of 1940, did not work a loss of citizenship:

Leong Kuai Yin v. U. S. (CCA 9th) 31 F (2d) 738 at 740;

Perkins v. Elg, 83 L Ed. 1320;

In re Tobiason, 36 Op. Atty. Gen. 535;

Hearings before Committee on Immigration & Naturalization, House of Representatives, 76th Congress, 1st Session, on H. R. 6127, superseded by H. R. 9980 (Nationality Act of 1940) p. 254, 268, 270, 275, 276, 278, 280.

Expatriation cannot be presumed by removal from the United States of a native citizen during minority:

Perkins v. Elg, 83 L. Ed. 1320, 1326;

U. S. v. Howe, (N. Y. 1916) 231 F. 546.

A minor being possessed of the right of citizenship cannot expatriate himself during his minority:

U. S. ex rel Baglivo v. Day (N. Y. 1928) 28 F. (2d) 44.

One owing allegiance to one state is deemed to continue such allegiance until disavowed and acceptance of him by another state:

Morse on Citizenship (1881), p. 160, Sec. 129, cited with approval in

Ex Parte Griffin, (N. Y. 1916), 237 F. 445 at 454.

Citizenship cannot be lost by treaty agreement:

In re Reid, 6 Fed. Supp. 800 (CCA), 73 F (2d) 153, not reviewed by Supreme Court for: application for certiorari not filed in time, 299 U. S. 544, Circuit Court opinion overruled by *Perkins v. Elg, supra.*

Voting in a foreign state did not, before Nationality Act of 1940, constitute an act of expatriation:

LaMoreaux v. Ellis (Mich. 1891), 50 N. W. 812.

In any event, before the Nationality Act of 1940, voting was not of significance with respect to intention to claim or not to claim citizenship:

U. S. v. Yasui (Ore. 1942), 48 Fed. Supp. 40.

And finally intention not to be expatriated may be shown:

State v. Jackson, 65 A. 657 (Vt. 1907);

Riley v. Hawes, 24 F (2d) 686.

If appellee became an expatriate, such status must have been acquired by reason of some affirmative act or acts done by him from which expatriation would be deemed to have resulted under then existing Federal Statutes.

The appellant, having asserted the expatriation of appellee, has the burden of proof thereof:

U. S. ex rel Belokumsky v. Todd, 68 L. Ed. 221;

Riley v. Hawes (CCA 1st), 24 F (2d) 686.

Until the effective date of the Nationality Act of 1940, a native born citizen whose parents during his minority became citizens of another state, acquired a dual citizenship. He was not deprived of his nat-

ural right of citizenship, and he acquired the benefit of the changed citizenship of his parent. This was thought to constitute an evil. In order to correct the anamoly of a person having the benefit of citizenship in this nation and also that of another state, the Nationality Act of 1940 was adopted by Congress. By design a proviso was inserted in sub-division A of Sec. 801, Title 8, U. S. C. A. This proviso in effect afforded an opportunity to all persons who had acquired foreign citizenship through the naturalization of their parent or parents and who were citizens of the United States living abroad, *and had not theretofore expatriated themselves under then existing law by their own voluntary acts, to return to the United States and take up permanent residence therein.*

Up until the Attorney General of the United States handed down his opinion in the Tobiason case (*In re Tobiason,* 36 Op. Atty. Gen. 535), the Department of Labor, which had theretofore been handling naturalization matters, had adhered to the rule that the minor child of a citizen living abroad could not be divested of his citizenship by his parents becoming naturalized in another country. The Tobiason case was reversed in the opinion written by the Supreme Court in *Perkins v. Elg,* 83 L. Ed. 1320.

It is quite clear from the hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Congress, 1st Session on H. R. 6127, superseded by H. R. 9980, that the purpose of Congress was to enact legislation which would be

prospective rather than retroactive, and would afford a clear cut rule for determining the intention of a minor child to claim his U. S. citizenship where his parent or parents became expatriated during his minority. The proviso now contained in sub-division A, Sec. 801, was successfully proposed by the Department of Labor as an amendment to the Nationality Act of 1940, codified as 8 U. S. C. A. 801-a. For purpose of convenience of the Court, we have set forth in the Appendix hereto material statements made by Mr. Shoemaker, who represented the Department of Labor in support of the proposed amendment which later became a part of the Act.

We have been advised that this Court has been supplied with a volume containing the complete transcript of the hearings before the Committee on Immigration and Naturalization and have hereinabove directed the Court's attention to other pages further bearing out the intent of Congress to provide for the return of persons having the right of citizenship to this country if living abroad.

It is conceded that at the time of the adoption of the Nationality Act of 1940, *appellee had returned to this country and had established permanent residence therein.*

CONCLUSION

WHEREFORE appellee does ever pray that the appeal of the appellant be denied and that the judgment of the Honorable Sam Driver, Judge of the District Court, be affirmed.

Respectfully submitted,

GEORGE W. YOUNG,

Attorney for Appellee.

APPENDIX

Constitution of the United States
14th Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Act of March 2, 1907-8 U. S. C. A. 17

" * * * Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

" * * * And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war."

NATIONALITY ACT OF 1940

"Sec. 801, Title 8, U. S. C. A. General means of losing United States Nationality.

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: Provided, however, That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: Provided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of his* chapter to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship;

8 U. S. C. A. 903

"Sec. 903, Title 8, U. S. C. A. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.

'If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationalty status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V. S. 503, 54 Stat. 1171..''

STATEMENT OF THOMAS B. SHOEMAKER, DEPUTY COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF LABOR

MR. SHOEMAKER: To understand this issue here fairly, one has to go back just a short period to June 16, 1932. Prior to that time it had been the administrative view of the Department of Labor that a child could not be expatriated by the act of his parents by naturalization abroad. In other words, expatriation up to that time could not apply to a child whose parents were naturalized abroad. However, on June 16, 1932, the Attorney General handed down an opinion in the case of Ingrid Therese Tobiassen (36 Op. Atty. Gen. 535) in which he held that a child under such circumstances, being a minor and abroad, would lose its American citizenship by the act of the father or the parent becoming naturalized.

Necessarily the Department of Labor and the other departments were compelled to follow that ruling. We all had doubts. In any event, in the October 1938 term of the Supreme Court they handed down an opinion in the *Elg case* and that opinion reversed the views of the Attorney General in the *Tobiassen case* and held that the child could not be divested of its citizenship by the act of its parents. In other words, let me add right there that the Supreme Court laid down no hard and fast rule with respect to the loss of citizenship and that is the issue in this case and I ask that you Congressmen should read the opinion of the Supreme Court in that case.

I think even the State Department would concede that circumstances might govern such a case and that there is no hard and fast rule.

In our opinion, when this opinion of the Supreme Court was handed down in the *Elg case,* it reversed the views which have been expressed in the other case and which had been considered as the law of the land at that time when that law was drawn.

Now in regard to section 401, let me say that the Department of State and the Department of Labor have agreed that if this committee wishes, we will accept that as our views and not make any motion for an amendment to the code in any respect. We do believe, on the other hand, that if there is to be any amendment that a child or any person who has in good faith believed themselves to be an American citizen and represented and acted under that impression abroad should be given an opportunity within two years to return to the United States, and if they do not return within the period of two years the date of the approval of this act they are then forever estopped by such failure from thereafter claiming such American citizenship by virtue of the claims which they then have.

Now when the Tobiassen opinion was handed down by the Attorney General the Department told thousands of people they could not come across the border and those who accepted that opinion never made any attempt to come back although there were thousands

who had come in prior to that and they came in long after they had attained their majority. Up to that time many of these men who did not come back had labored and acted in good faith, being under the impression that they were good American citizens. Now why question their status? Why question the status of the individual who, for instance, has been away and always acted as a citizen and thought he was a citizen and has been stopped from coming back because the Department of Labor abided by that ruling? We say if those people have not done anything to expatriate themselves that then they as individuals should be given a period of time to return if they prefer to do so and a reasonable period of time should be granted for them within which to return.

Mr. Maciejewski: I believe I agree with you that there should be a time limit.

Mr. Rees: Now for the record: If we are going to write into the law a provision that says that they shall have a time limit of two years, or whatever it is, everyone can have that right.

In your opinion would you have that apply to all these people wherever they are throughout the world? Would you give all of them that right? Shall we put into the law then a statement that protects a lot of those people? Do you see what I mean, have a blanket section? Here are hundreds of thousands of people throughout the world and we are saying in respect to them that if they come into this country and live

here they may continue to be American citizens. Would that act apply to them as citizens who are entitled to the protection of this country wherever they are?

MR. SHOEMAKER: Since the fourteenth amendment to the Constitution was enacted in 1868 a person born in the United States would be a citizen of the United States by virtue of that amendment.

MR. MASON: It is the law of the land insofar as the Labor Department enforcement is concerned.

MR. SHOEMAKER: Yes; but we have a doubt.

MR. MASON: And the fact is that you put a hardship upon them because of that decision. Now you are saying that we are going to rectify this hardship by giving them at least two years within which to make an election. I am willing to go that far.

MR. FLOURNOY: That seems to assume they all wanted to do it but a number of those who tried to come back were prevented by the Tobiassen opinion. I think they would be comparatively small.

MR. REES: I assume that is correct.

MR. LESINSKI: Do I understand, Mr. Shoemaker, that under your amendment of this particular act that everyone would have a right to come in within two years?

MR. SHOEMAKER: That is right.

Mr. Lesinski: But what would happen about a child who left at the age of two years and is not ready for 20 years?

Mr. Shoemaker: He can come in under section 317 (a).

Mr. Lesinski: What do you mean by two years; after reaching the age of 21?

Mr. Shoemaker: I mean within two years of the effective date of this act.

Mr. Lesinski: After two years no one can come in? This is to take care of those now in. There are different ways of reading this and I do not take it that way.

Mr. Rees: The amendment proposed is this, that nationality shall not be lost as the result of naturalization of a parent unless and until the child shall have attained the age of 23 years.

Mr. Lesinski: In other words, this may go on for years and years.

Mr. Rees: Until he is 23 years in any event and those who are now beyond 21 years of age will have at least two years from the time of the passage of this act to establish their naturalization.

Mr. Shoemaker: May I add that unless some such clause is added to the act I anticipate that for years we will have these questions raised in the Department

of Labor as to the eligibility of a person to apply for citizenship just as we are doing today.

MR. REES: Before we close, I think the State Department has considered the amendment proposed by the Department of Labor. The State Department has no amendment to offer to that.

MR. FLOURNOY: I am authorized to say that if the committee favors the form of the Department of Labor, then the State Department would like to have an opportunity to suggest some modifications, including the question of the status of the child of these people born in that country. Are they to remain citizens of the United States indefinitely, born there many years after the naturalization in that country? Are they citizens? Usually the other parent would be a citizen of the country naturally where they are residing.

MR. MASON: That is the third generation that we are talking about.

MR. CURTIS: I am not sure whether I get that, but on the point that you raise there, does everybody understand what that situation was?

MR. REES: The Labor Department amendment raises the question unnecessarily, but I think that it is something that is to be considered. I would like to have it cleared up by some legal authority.

MR. CURTIS: May I give an illustration in regard to that?

Mr. Rees: Yes.

Mr. Curtis: We will imagine that a man is 21 years of age and under the present law he is a citizen of the United States and he has now two years in which to elect. Let us suppose for some reason or other he has not been called to military duty in the country where he is living and say he is called after he is 21 years old, probably one month after 21. Now, I would understand from the arguments I have heard this morning that that man can claim the protection of the United States, can't he?

Mr. Mason: Assuming if this were the law of the land.

Mr. Lesinski: Then he would have to leave and come over here, if they would permit him to come over here.

Mr. Curtis: During the two years he can exercise the protection of the United States.

Mr. Lesinski: Yes; but in the very same case that you are talking about where he was inducted in the army, he would have to go because he would be forced in although he is claiming American citizenship.

Mr. Flournoy: I think it is pretty well established as a proof of dual nationality and his living in one country would not entitle him to the protection of the other country, if he is a national of both countries. Also we had cases like that in the last war. One of

these persons had been naturalized here through his parents becoming citizens of the United States. We put him in the Army. If any foreign government made a protest we would certainly not pay any attention to it. He is living here and a citizen of the United States and he is just as much obligated to serve in the Army as anyone else.

Mr. Mason: Accordingly, if we pass the two-year limitation it would not change the status of these people whatever during the two-year period. They would not get any more protection other than they do now.

Mr. Flournoy: They would not be entitled to it, although they might claim it.

Mr. Van Zandt: We might offer the protection and the young man might object to remaining in the army of a foreign country but they would not pay any attention to him.

Mr. Lesinski: We will adjourn this meeting until Tuesday morning at 10 o'clock.

(Thereupon, at 12:30 p. m., the hearing adjourned to meet on Tuesday, May 7, 1940, at 10 a. m.)